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Hon. Christopher Smith
United States House of Representatives
Washington, DC
BY FAX

Dear Congressman Smith:

I am taking the liberty of writing to you today because I am deeply concerned about the application of H.R. 333 to peaceful pro-life protestors. I hope the following opinion letter will be helpful to you.

The proposed legislation would create a new 11 U.S.C. §523(a)(20), denying discharge for any judgments under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §248 (2000), or under similar state laws, or under injunctions restricting protest at abortion clinics.

The impact of this provision on peaceful pro-life protestors would be grave. Existing law substantially restricts protest at abortion clinics, and in their zeal to eliminate violent protests and obstructive protests, courts and legislators have forbidden much protest that is peaceful and nonobstructive. Proposed §523(a)(20) would add an additional sanction to all this existing law: money judgments for abortion protest would follow protestors to the ends of their lives. No matter their financial circumstances, no matter the size of the judgment or the nature of the protest, these judgments could never be discharged in bankruptcy.

1. The Freedom of Access to Clinic Entrances Act (FACE)

Proposed §523(a)(20)(A) precisely tracks the key substantive language of FACE. FACE prohibits conduct that:

> "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with"

access to "reproductive health services," or attempts to do so. 18 U.S.C. §248(a)(1) (2000).

Proposed §523(a)(20) denies discharge for any judgment arising from actions of the debtor that:

> "by force or threat of force or by physical obstruction, intentionally injure, intimidate, or interfere with"

access to lawful goods or services. The key language in the two block quotes is obviously identical save for the difference between singular and plural verbs ("whoever" is the subject in FACE; the debtor's "actions" is the subject in proposed §523(a)(20)).

Because the proposed language is substantively identical to FACE, it will be read in light of existing decisions under FACE. Existing interpretations of FACE will almost certainly be read into §523(a)(20). Worse, abortion clinics and their supporters will likely argue that by re-enacting the same statutory language, Congress has approved existing decisions and thus confirmed their status as valid and appropriate interpretations of FACE itself. This is a critical point, because existing interpretations of FACE in the lower courts, extraordinarily favorable to the abortion clinics and their supporters, have not yet been accepted or rejected by the Supreme Court of the United States. Congressional passage of proposed §523(a)(20) could figure prominently in eventual Supreme Court arguments on the interpretation of FACE, lending plausible support to the worst interpretations of that statute.

I will not consider in this opinion letter the interpretations of "force or threat of force," "intentionally injure," or "intimidate." Some interpretations of those provisions have been surprisingly expansive, but those forms of protest are not the issue for most protestors. The real work of FACE, and of proposed §523(a)(20), is in the provisions that target anyone who "by physical obstruction . . . interferes with . . . or attempts to . . . interfere with" access to a clinic. Each of these terms has been construed or defined to mean more than first appears. No actual interference, and no actual physical obstruction, is required for a violation. Courts have found violations in peaceful protest that did not actually prevent access to clinics.

"Physical obstruction" is defined in 18 U.S.C. §248(e)(4) to mean making ingress or egress "impassable . . . or unreasonably difficult or hazardous." What is "unreasonably difficult" has, in the lower federal courts, sometimes turned out to be remote from physical obstruction.

Thus, in *United States v. Mahoney*, 247 F.3d 279 (D.C. Cir. 2001), the court found physical obstruction and interference with access from a single protestor kneeling in prayer outside a locked door to an abortion clinic. *Id.* at 283-84. The door was a "rarely used" emergency exit. The court said that someone might have used the door, and that the law does not distinguish frequently and infrequently used doors. More remarkable still, the court held that a single person keeling in prayer rendered use of that door "unreasonably difficult" and forced patients to use a different entrance. *Id.* at 284.

Mahoney also held that six other defendants physically obstructed and interfered with access to another door. The court of appeals' entire discussion of this holding is that five protestors

"knelt or sat within five feet of the front door," that the sixth defendant "was pacing just behind them," and that they "offered passive resistance and had to be carried away." *Id.* at 283. The court does not even say whether they were arrayed across the sidewalk or along the sidewalk, whether they left a passage open, or any other fact that might go to a plain meaning understanding of "physical obstruction" or to preserving a reasonable right to protest. It was enough for a violation that they were near the door.

Both FACE and proposed §523(a)(20) are limited to "intentional" violations, but *Mahoney* shows that protection to be illusory. The court found specific intent to interfere with access to the clinic, even in the case of the lone protestor praying before the locked door. It relied on the fact that the protestor prayed that women approaching the clinic would change their mind about getting an abortion; the court quoted his prayer as evidence of criminal intent. 247 F.3d at 283-84. To similar effect is *United States v. Gregg*, 32 F. Supp. 2d 151, 157 (D.N.J. 1998), *aff'd*, 226 F.3d 253 (3d Cir. 2000), *cert. denied*, 523 U.S. 971 (2001). *Gregg* had much more evidence of actual obstruction than *Mahoney*. Even so, the *Gregg* court relied on defendants' "anti-abortion statements, including imploring women not to go into the clinic or not to kill their babies," and on the fact that defendants "carried anti-abortion signs," as evidence of forbidden intent. The government in these cases has offered evidence of opposition to abortion as evidence of specific intent to obstruct access, and the courts have relied on this evidence for that purpose. Clinics and their supporters would of course argue that Congress has codified these holdings if it enacts proposed §523(a)(20).

Courts have emphasized that FACE plaintiffs need not prove actual obstruction. "It is not necessary to show that a clinic was shut down, that people could not get into a clinic at all for a period of time, or that anyone was actually denied medical services." *People v. Kraeger*, 160 F. Supp. 2d 360, 373 (N.D.N.Y. 2001). Plaintiffs need not "show that any particular person was interfered with by the defendants' obstruction." *United States v. Wilson*, 2 F. Supp. 2d 1170, 1171 n.1 (E.D. Wis.), *aff'd as United States v. Balint*, 201 F.3d 928 (7th Cir. 2000).

To sum up, proposed §523(a)(20) would re-enact statutory language that has been interpreted not to require actual obstruction, has been interpreted to prohibit a single protestor kneeling in prayer near an unused exit, and has been interpreted to treat anti-abortion statements as evidence of criminal intent. These interpretations would almost certainly be read into §523(a)(20), and there would be a serious argument that Congress had confirmed these interpretations in FACE itself.

2. Injunctions

Proposed §523(a)(20)(B) makes nondischargeable any debt arising from violation of an "injunction that protects access to" a facility that provides lawful goods or services. Nothing in proposed §523(a)(20)(B) even purports to confine this subsection to violent or obstructive protest.

Under FACE and under other sources of law, courts have issued injunctions establishing buffer zones and bubble zones, forbidding protestors from coming within stated distances of the

property line of abortion clinics or within stated distances of persons approaching abortion clinics. In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the Supreme Court upheld the constitutionality of an injunction forbidding protestors to step onto clinic property, or onto public property within 36 feet of the clinic's property line. The effect was to confine protestors to the other side of the street. The Court also affirmed an injunction against making any noise audible within the clinic. In *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), the Court upheld an injunction against any defendant "demonstrating within fifteen feet" of any doorway or driveway at any abortion clinic in the Western District of New York. The injunction in that case also prohibited any defendant from "trespassing" on any clinic's parking lot. (The injunction is set out *id.* at 366 n.2.)

Since *Madsen*, the lower courts have become more aggressive about issuing buffer zone injunctions without first attempting to control alleged obstruction with less intrusive means. Examples include the buffer zone injunction issued on remand after the limited violations in *United States v. Mahoney*, under the case name *United States v. Alaw*, 180 F. Supp. 2d 197 (D.D.C. 2002), and the preliminary injunction confining a single protestor to the other side of the street in *United States v. McMillan*, 946 F. Supp. 1254 (S.D. Miss. 1995).

Many forms of protest inside such buffer zones would not obstruct or interfere with anything. A single picketer with a pro-life sign, held in contempt of court for standing quietly inside a buffer zone, would be covered by proposed §523(a)(20)(B), and any fines, compensation, or attorneys' fees awarded would be nondischargeable. The protection for peaceful protest in proposed §523(a)(20)(B) is supposed to come from the clause excluding protest protected by the First Amendment. But given *Madsen* and *Schenck*, this protection means little; much protest that is peaceful and nonobstructive is not protected by current interpretations of the First Amendment.

3. State Laws

Proposed §523(a)(20)(A) also denies discharge for judgments arising from violation of state laws protecting access to clinics if the violation includes actions that by "force or threat of force or by physical obstruction, intentionally injure, intimidate, or interfere with" clinic access, or attempt to do so. Certainly this includes statutes like the New York Clinic Access and Anti-Stalking Act, which substantially tracks FACE. (This law is codified as N.Y. Penal Law §§240.70 and 240.71 (McKinney Supp. 2002), and N.Y. Civil Rights Law §79-m (McKinney Supp. 2002)).

It will be a matter of interpretation and litigation whether §523(a)(20)(A) denies discharge for other state laws imposing more expansive restrictions on pro-life protest. For example, in *Hill v. Colorado*, 530 U.S. 703 (2000), the Supreme Court upheld Colo. Rev. Stat. §18-9-122(3) (West 1999), which makes it illegal to approach within eight feet of another person without that person's consent, for any form of "protest, education, or counseling" within one hundred feet of the entrance to a health care facility. The Court relied in part on the state's interest in "unimpeded access to health care facilities." 530 U.S. at 715.

Now consider a pro-life protestor who approaches a person outside an abortion clinic and

offers a leaflet. Plainly this protestor would be violating the statutory eight-foot bubble zone. The statute currently authorizes compensatory damages for this violation, Colo. Rev. Stat. §18-9-122(6) (West 1999) and Colo. Rev. Stat. §13-21-106.7 (West 1997), and it could easily be amended to add liquidated damages or civil penalties on the model of FACE. In discharge litigation under proposed §523(a)(20), abortion clinics and their supporters would argue that the statute was a reasonable prophylactic means to prevent physical obstruction that interferes with clinic access, and that any violation of the statute amounts to such physical obstruction and interference. Prospective patients would prefer to enter the clinic without being offered a leaflet, and they may think the proffer of the leaflet made their entrance unreasonably difficult. If any of these arguments were accepted, judgments for violating state bubble-zone statutes would be nondischargeable under proposed §523(a)(20).

I do not think that would be a correct interpretation of proposed §523(a)(20). But after examining judicial interpretations of FACE, I think there is a substantial risk that some courts would reach this interpretation. If judgments for violating buffer-zone and bubble-zone injunctions are nondischargeable, it would likely seem a small step to hold that judgments for violating bubble-zone statutes are also nondischargeable.

4. The Magnitude and Nature of the Judgments at Issue

Proposed §523(a)(20) is not confined to compensatory damages. The statutes at issue authorize punitive damages, liquidated statutory damages, civil penalties, attorneys' fees, expert witness fees, and criminal fines. Their purpose is to deter and punish, not just -- or even principally -- to compensate for any harm done. In fact, awards of actual compensatory damages are quite rare. The plaintiffs' preference for liquidated damages and penalties is most important in those cases in which there is no obstruction in the ordinary meaning of the word, or only brief and marginal obstruction. In such cases, there is little or no actual damage, but there still be can substantial monetary judgments.

FACE authorizes $5,000 per violation in statutory damages, at the election of plaintiffs, either private or governmental. 18 U.S.C. §248(c)(1)(B) (2000). In actions by the United States or by any State, it authorizes a civil penalty of $10,000 per protestor for the first non-violent physical obstruction, and $15,000 per protestor for each subsequent non-violent physical obstruction. 18 U.S.C. §§248(c)(2)(B) and 248(c)(3)(B) (2000).

The lower federal courts have held that the statutory damages are per violation, not per protestor. So if ten people combine to block a clinic entrance, a single judgment of $5,000 in statutory damages (plus costs and attorneys' fees) may be entered jointly and severally against them. *United States v. Gregg*, 226 F.3d 253, 257-60 (3d Cir. 2000), *cert. denied*, 523 U.S. 971 (2001).

But this "per violation" protection does not prevent multiple awards for multiple violations, and each alleged act of interference may be parsed as a separate violation. Moreover, civil penalties may be awarded against each protestor, and civil penalties and statutory damages may be awarded

in the same case for the same violation. Thus a federal court has entered $80,200 in judgments against four members of a single family, for ten separate violations, none of them violent and none of them creating anything like an effective "blockade" of the clinic. *People v. Kraeger*, 160 F. Supp. 2d 360, 377-80 (N.D.N.Y. 2001). And of course there is no federal limit on the damage and penalty provisions that states might enact for judgments that would be nondischargeable under §523(a)(20).

5. The Effect of Withholding Discharge

I am not an expert on bankruptcy law or debtor-creditor law, and I have not done extensive research on the options available to a protestor with a nondischargeable judgment beyond his capacity to pay. But the basics are clear enough to anyone with credit cards and a mortgage. If you are unable to pay, the creditor first threatens your credit rating, then your possessions; eventually, if there is enough at stake, the creditor sends the sheriff to seize your possessions. If you are unable to pay and unable to discharge the debt in bankruptcy, the threats and seizures would never end.

For the rest of his life, the protestor subject to a nondischargeable judgment would find it difficult or impossible to get credit. He could not get a mortgage; he could not get a loan for a new car. The creditor might be an abortion clinic motivated to make examples of pro-life protestors; such a creditor could make vigorous and continuing efforts to collect for as long as the protestor lived. In most states, the protestor's home could be seized, his wages could be garnished, his financial accounts could be emptied. In some states, even his furniture could be seized. All or part of everything the protestor ever earned or acquired for the rest of his life could be seized by the abortion clinic creditor, until and unless the judgment was paid in full, with interest.

A large and nondischargeable debt, beyond one's capacity to pay, especially in the hands of a hostile and motivated creditor, is a financial death sentence. That is what even peaceful pro-life protestors have to fear if proposed §523(a)(20) is added to the existing aggressive judicial interpretation of FACE and similar laws. I believe that any more optimistic interpretation of the bill is wishful thinking.

Very truly yours,

MA Glendon

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